

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the
Family Child Care License of Tiffany P.
Deering and Kimberly A. Jensen

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came before Administrative Law Judge Amy J. Chantry for an evidentiary hearing on May 29, 2013. The hearing record closed at the end of the hearing.

Janine L. LePage, Assistant Crow Wing County Attorney, appeared on behalf of Crow Wing County Community Services (County) and the Minnesota Department of Human Services (Department). Tiffany P. Deering (Licensee) appeared on her own behalf, without counsel. Kimberly A. Jensen did not appear.

STATEMENT OF THE ISSUES

Should the Department's Order of Revocation of the Licensee's family child care home be affirmed because a disqualified individual was: residing in her day care home; allowed direct contact with day care children; or allowed access to day care children?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the revocation of the Licensee's family child care license should be rescinded. The individual who was disqualified is no longer residing in the Licensee's home and the Licensee has not had any contact with the disqualified individual since November of 2012. The individual does not have access to or direct contact with Licensee's day care children.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Tiffany P. Deering, operates a family day care out of her home in Brainerd, Minnesota.¹

¹ Testimony of Diane Anderson; Testimony of Tiffany P. Deering.

2. The Licensee obtained licensure of her family day care in 2007 and she has successfully undergone the re-licensing process three times.²

3. Diane Anderson has been employed as a County Licensuror with Crow Wing County Community Services for 20 years.³

4. Ms. Anderson has worked as the Licensee's licensing social worker since the Licensee was first licensed in 2007.⁴

5. Ms. Anderson has not had any concerns with the care the Licensee provided to the children in her care. The Licensee did a good job of calling Ms. Anderson to ask questions worked hard to ensure that her license remained in good standing.⁵

6. The Licensee has had two prior Correction Orders issued against her day care.⁶

7. The first Correction Order was issued for improper supervision. Approximately six months after being licensed, the Licensee went into a store. While the Licensee was in the store, she had her cousin watch the day care children. Instead of standing next to the Licensee's vehicle to supervise the children, the Licensee's cousin sat in another vehicle that was parked next to the Licensee's vehicle.⁷ It was determined that the Licensee's cousin should have stood between the two vehicles so that she could have provided better supervision of the children.

8. The second Correction Order was issued because a fire extinguisher in the day care home was expired and the Licensee was short of her required yearly training by eight hours.⁸

9. In October of 2012, the Licensee contacted Ms. Anderson to inform her that Todd Michael Nelson had moved in to live with her at the day care home.⁹

10. The Licensee requested that Ms Anderson complete the required background study on Mr. Anderson.¹⁰

11. On October 9, 2012, Mr. Nelson completed the Background Study Notification for Release of Information form.¹¹

² Test. of D. Anderson.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Test. of D. Anderson; Test. of T. Deering.

⁷ Test. of T. Deering.

⁸ *Id.*

⁹ Test. of D. Anderson.

¹⁰ *Id.*

¹¹ Ex. 3.

12. On November 6, 2012, the County notified the Licensee and Mr. Nelson that Mr. Nelson was disqualified from any position allowing direct contact with or access to the Licensee's day care children.¹²

13. Mr. Nelson was disqualified because the Department concluded, based on a preponderance of the evidence determination, that he had committed Criminal Sexual Conduct in the Third Degree¹³ The Department concluded that Mr. Nelson had engaged in sexual intercourse with a 14-year-old girl.¹⁴

14. On November 6, 2012, Mr. Nelson was notified of his right to request reconsideration of the disqualification.¹⁵

15. Mr. Nelson requested reconsideration of his disqualification. However, on February 1, 2013, the Department affirmed his disqualification and did not set it aside.¹⁶

16. Mr. Nelson did not appeal the Department's decision.¹⁷

17. The Licensee acted immediately in removing Mr. Nelson from the day care home once she learned of the disqualification in November of 2012.¹⁸

18. In March of 2013, Ms. Anderson made an unannounced visit to the Licensee's day care home.¹⁹

19. During the unannounced visit, Ms. Anderson confirmed that Mr. Nelson was not residing in the home.²⁰

20. On March 5, 2013, Ms. Anderson contacted Mr. Nelson's father, Todd Nelson, who verified that his son, Michael, was living with him and that his son had moved in prior to New Year's 2013.²¹

21. Ms. Anderson has not received any reports that Mr. Nelson is residing at the Licensee's residence since November of 2012.²²

¹² *Id.*

¹³ Minn. Stat. § 609.344, subd. 1(b) (making it a crime for a person to engage in sexual penetration with another person if the complainant is at least 13 but less than 16 years of age and the actor is no more than 36 months older than the complainant).

¹⁴ Test. of D. Anderson; Ex. 2.

¹⁵ Test. of D. Anderson.

¹⁶ *Id.*

¹⁷ Test. of D. Anderson.

¹⁸ Test. of D. Anderson; Test. of T. Deering; Ex. A; Ex. B; Ex. C.

¹⁹ Test. of D. Anderson.

²⁰ *Id.*

²¹ Test. of D. Anderson; Ex. 1.

²² Test. of D. Anderson.

22. Ms. Anderson does not believe that Mr. Nelson is residing at the Licensee's day care home or that the Licensee is in a relationship with him.²³

23. Ms. Anderson believes that the Licensee has taken this issue seriously and that it would be best for the Licensee and her day care children if the revocation of her family child care license was rescinded.²⁴

24. The Licensee's day care does not present a risk of harm to the children in her care because Mr. Nelson is not residing with the Licensee or having contact with her.²⁵

25. On February 1, 2013, the Department notified the Licensee that her license to provide family child care was revoked.²⁶

26. On March 21, 2013, the Department issued a Notice of and Order for Hearing in this matter.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 245A.07, subd. 2a and 14.50.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department and the County have complied with all of the substantive and procedural requirements of law and rule.

4. Minn. R. 9502.0335, subp. 2, concerning reporting to the Department provides in part:

The provider shall inform the agency:

A. Within 30 days of any change in the regular membership of the household within the day care residence or the addition of an employee who will regularly be providing care;

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Notice and Order for Hearing, dated March 21, 2013.

5. A background study must be conducted on the applicant and any individual age 13 or over living in the household where the licensed program will be provided.²⁷

6. Minn. Stat. § 245A.07 and Minn. R. 9502.0335 authorize the Commissioner to revoke a license where a disqualified person lives in the day care residence or is present during day care hours.

7. Under Minn. Stat. § 245A.07, subd. 3, if the Department demonstrates that reasonable cause exists to take action, the burden of proof shifts, in a hearing on a license revocation, to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws and rules allegedly violated.

8. Minn. R. 9502.0335, subp. 6 provides as follows:

An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant or provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

Has a disqualification under Minn. Stat. § 245C.15, that is not set aside under Minn. Stat. § 245C.22, or for which a variance has not been granted under Minn. Stat. § 245C.30.

9. The Department failed to demonstrate reasonable cause to believe that the Licensee had a disqualified individual living in her residence since November of 2012.

10. The Licensee has proved by a preponderance of the evidence that she is in compliance with all applicable laws related to her license since learning of the Department's determination.

11. A decision to revoke a license must take into account "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety or rights of persons served by the program" and "the facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, [and] available consumer evaluations, of the program . . ." as required by Minn. Stat. §§ 245A.04, subd. 6, and 245A.07, subd. 1.

12. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

13. The Administrative Law Judge adopts as Conclusions any findings that are more appropriately described as Conclusions and as Findings any Conclusions that are more appropriately described as Findings.

²⁷ Minn. Stat. § 245C.03, subd. 1.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Human Services RESCIND the revocation of the family child care license of Tiffany P. Deering.

Dated: June 28, 2013

s/Amy J. Chantry

AMY J. CHANTRY

Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this Report to file exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, P.O. Box 64941, St. Paul MN 55164, (651) 431-4319, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closed upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Burden of Proof

The Department has the burden to demonstrate “reasonable cause” for revocation of the family child care license under Minn. Stat. § 245A.07, subd. 3. The Department may demonstrate “reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder

failed to comply fully with applicable law or rule.”²⁸ When such facts are shown that support a conclusion that a violation occurred, the burden shifts to the license holder to demonstrate compliance with the applicable statute or rules. But, if the Department fails to show reasonable cause, the burden does not shift and the violation must be dismissed.

Analysis

The County conducted a thorough investigation by interviewing the relevant parties in this case. In March of 2013, Diane Anderson, a County Licensur conducted an unannounced visit to the Licensee’s home. Ms. Anderson has 20 years of experience in licensing and her testimony at the hearing was thorough, candid and persuasive. Ms. Anderson’s unannounced visit confirmed that Mr. Nelson was not residing in the Licensee’s home. Moreover, on March 5, 2013, Ms. Anderson spoke with Mr. Nelson’s father, Todd Nelson, who confirmed that his son moved back in with him prior to New Year’s of 2013. Both the unannounced visit and Ms. Anderson’s conversation with Mr. Nelson’s father confirmed that he does not live in the licensed home. The Licensee also submitted three letters of support confirming that Mr. Nelson had moved out of her home in November of 2012.²⁹ Ms. Anderson does not believe that Mr. Nelson is residing in the Licensee’s home or that the Licensee is having any contact with him.

There is no evidence in the hearing record that Mr. Nelson is living in the licensed home, that he has a legal right to be in the home, or that he had any contact with day care children. Because the evidence shows that Mr. Nelson does not, in fact, live at the licensed home or that he has direct contact with or access to the Licensee’s day care children, the Licensee is in full compliance with the applicable law. Thus, revocation is not appropriate on these facts.

Minn. Stat. §§ 245A.04, subd. 6, and 245A.07, subd. 1, a decision to revoke a family child care license must take into account the chronicity of this violation. According to Ms. Anderson, the Licensee’s day care is a lawfully and well run program. In fact, Ms. Anderson noted that the Licensee would often call her with questions to make sure that she was properly maintaining her license. She also followed proper procedure by notifying the County as soon as Mr. Nelson moved into her home so that he could undergo a background study. Since the evidence confirms that Mr. Nelson is not having contact with the Licensee or her day care children there is no risk of harm to the children in her care. The fact that the Licensee removed Mr. Nelson from her home once she learned of his disqualification, demonstrates that she will ensure the safety of the children in her care. While the safety of the children is paramount, there is no evidence to demonstrate that the children’s safety would be at risk if the revocation of the Licensee’s family child care license was rescinded. Therefore, it is reasonable to conclude that an analysis of the factors indicates that revocation is not warranted under these circumstances.

²⁸ Minn. Stat. § 245A.08, subd. 3.

²⁹ Ex. A; Ex. B; Ex. C.

Therefore, the Administrative Law Judge respectfully recommends that the Order revoking Tiffany P. Deering's family child care license be RESCINDED.

A. J. C.